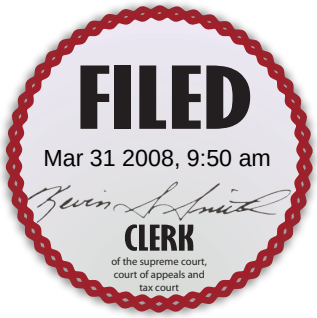

ATTORNEY FOR APPELLANT:

ROBERT H. BELLINGER, II
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LOLITA HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0710-CR-487
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Marcia L. Linsky, Magistrate
Cause No. 02D04-0607-CM-4956

March 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lolita Harris ("Harris") was convicted in Allen Superior Court of Class B misdemeanor disorderly conduct. Harris appeals and argues that the evidence is insufficient to support her disorderly conduct conviction. We affirm.

Facts and Procedural History

On July 19, 2006, Fort Wayne police officers Clayton Taylor ("Officer Taylor") and Phillip Ealing ("Officer Ealing") responded to a report of a disturbance in the parking lot of a grocery store. When they arrived at the store, the officers separated the individuals involved. In the course of the investigation, Harris's sister was placed under arrest. At that point, Harris started shouting at her sister. The officers repeatedly told Harris to step back and quiet down.

After her sister's arrest, Harris began shouting across the parking lot at the group of people involved in the initial disturbance. The officers gave Harris her sister's car keys and advised her to leave the premises. Instead, Harris continued to yell at one of the individuals in the group and eventually shouted, "That's fine. You'll get yours, bitch, just f***ing wait." Tr. p. 88. Harris was then placed under arrest for, and later charged with, Class B misdemeanor disorderly conduct.

A jury trial commenced on June 13, 2007, and Harris was found guilty as charged. Harris was sentenced to 180 days, but the entire sentence was suspended. Harris now appeals. Additional facts will be provided as necessary.

Discussion and Decision

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139

(Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To convict Harris of Class B misdemeanor disorderly conduct, the State was required to prove that Harris recklessly, knowingly, or intentionally made unreasonable noise and continued to do so after being asked to stop. See Ind. Code § 35-45-1-3 (2004 & Supp. 2007). Harris asserts that her conduct constitutes speech protected by Article One, Section Nine of the Indiana Constitution, and therefore, it cannot be the basis for a charge of disorderly conduct. In the alternative, she claims that the evidence is insufficient to establish that she made "unreasonable noise."

First, we consider whether Harris's conviction violated her right of free speech. Article One, Section Nine of the Indiana Constitution provides: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." The right of free speech protected in Section Nine is "expressly qualified by the phrase 'but for the abuse of that right, every person shall be responsible.'" J.D. v. State, 859 N.E.2d 341, 344 (Ind. 2007).

> When reviewing whether the State has violated Article 1, Section 9, we employ the following two-step analysis. First, we must determine whether state action has restricted a claimant's expressive activity; second, if it has, we must decide whether the restricted activity constituted an "abuse" of the right to speak.

Blackman v. State, 868 N.E.2d 579, 585-86 (Ind. Ct. App. 2007), trans. denied (citations omitted).

Harris's conviction for disorderly conduct constitutes a restriction of her expressive activity by state action. See Madden v. State, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003), trans. denied ("We conclude that this condition is satisfied by Madden's conviction for making unreasonable noise based on her swearing and screaming at police officers while her husband was being cited for a traffic violation.")

Consequently, we must determine whether the restrictive activity constituted an abuse of the right of free speech. Id. "Generally, when reviewing the State's determination that a claimant's expression was an abuse of the right of free speech under the Indiana Constitution, we are required to find only that the determination was rational." Id. If the claimant's speech giving rise to the disorderly conduct conviction is political, however, the State must demonstrate that it has not materially burdened the claimant's opportunity to engage in political expression." Id.

For purposes of Article One, Section Nine, a claimant's expressive activity is political "if its point is to comment on government action, including criticism of the conduct of an official acting under color of law." Id. We judge the nature of the expression by an objective standard, and Harris bears the burden to establish that her expression would have been understood as political. Id. "[W]here an individual's expression focuses on the conduct of a private party –including the speaker . . . it is not political." Whittington v. State, 669 N.E.2d 1363, 1370 (Ind. 1996). "If the expression is ambiguous, we must conclude the speech was non-political and review the

constitutionality of the disorderly conduct conviction under standard rationality review." Madden, 786 N.E.2d at 1156.

At trial, Officer Ealing testified that as they were arresting Harris's sister, "there was a lot of yelling between the Defendant and her sister." Tr. p. 85. He also stated that as he was trying to get Harris to leave the premises, Harris began yelling at the group of people involved in the initial disturbance and eventually threatened one of those individuals. Tr. pp. 87-88. Officer Taylor testified that Harris was yelling at her sister and the group across the parking lot, but that she also said she was "recording the incident." Tr. p. 105. But, Harris directed that comment towards her sister, not the officers. Tr. pp. 114, 121. Moreover, Harris testified that she "wasn't yelling at the police." Tr. p. 123. From this evidence, we conclude that Harris's speech was not political and therefore subject to rational review.

"Police officers conducting a legitimate investigation must be able to perform their duties without unreasonable interruption." Blackman, 868 N.E.2d at 588. The State could have reasonably concluded that Harris's expressive activity –because of its volume, the attention it attracted, and the interference with the officers' investigation– "was a threat to peace, safety, and well-being" and, therefore, she abused her right of free speech. See id. at 587.

Harris was yelling and screaming at her sister while the officers were trying to arrest her sister. Harris was repeatedly asked to quiet down and to leave the premises, but would not do so. Harris continued to yell at the group involved in the initial disturbance. She was arrested after she threatened an individual of that group, yelling, "That's fine.

You'll get yours, bitch, just f***ing wait." Tr. p. 88. Under these facts and circumstances, the State could have rationally concluded that Harris obstructed and interfered with the officers' attempts to function as law enforcement officers; therefore, her expressions amounted to an abuse of her right of free speech. Harris's arrest for disorderly conduct did not violate Article One, Section Nine of the Indiana Constitution.

We now turn to Harris's argument that the State failed to prove that she "made unreasonable noise." Officer Ealing testified that Harris was yelling at the group of people located approximately seventy-five to one hundred feet across the parking lot of the grocery store. Tr. p. 87. Officer Taylor stated that "there were crowds of people near the front of the store that were kind of stopping to listen and watch what was going on." Tr. p. 104. Both officers stated that Harris was yelling loudly and refused to quiet down. This evidence is sufficient to establish that Harris produced decibels of sound that were too loud for the circumstances. See Blackman, 868 N.E.2d at 584. Accordingly, we conclude that Harris's Class B misdemeanor disorderly conduct conviction is supported by sufficient evidence.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.